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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 642

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, California,
Petitioner,

vs.

VERON ATCHLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINION BELOW

The memorandum opinion of the United States District Court for the Northern District of California, printed in the Appendix at pages 68 through 79, is reported at 300 F. Supp. 68 (N.D. Cal. 1968). The Court of Appeals per curiam majority opinion affirming the order of the District Court and Judge Barnes'

dissent thereto, are printed in the Appendix at pages 80 through 85, and reported at 412 F.2d 230 (9th Cir. 1969).

JURISDICTION

The judgment of the Court of Appeals was entered May 27, 1969, and our petition for rehearing was denied June 26, 1969. The petition for certorari was filed with this Court September 4, 1969, and granted February 24, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court erred in refusing to apply the presumption of correctness declared in Title 28, United States Code, Section 2254(d), to the finding by the California trial and appellate courts that Atchley's tape recorded statement was voluntary.

2. Should a district court on a petition for a writ of habeas corpus relitigate the voluntariness of a confession where this issue was presented to the state trial court whose decision adverse to the defendant was affirmed by a unanimous state supreme court?

3. Can a federal district court compel the state courts to act beyond their jurisdiction by invoking the "procedure of convenience" outlined in *Jackson v. Denno,* 378 U.S. 368 (1964).

STATUTE INVOLVED

This case concerns the proper interpretation of Title 28, United States Code, Section 2254(d), which is set forth in Appendix C to the Petition for Certiorari at pages 19 through 22.

STATEMENT OF THE CASE

A. Proceedings in the State Courts.

Veron Atchley was convicted by a jury of the first degree murder of his wife. The death penalty was imposed. Upon appeal to the California Supreme Court his conviction was affirmed in an opinion set forth in the Appendix at pages 48 through 67, and reported at 53 Cal.2d 160, 346 P.2d 764 (1959).

Subsequently, Atchley's sentence was commuted by the governor to life imprisonment with eligibility for parole.

B. Proceedings in Federal Courts.

Atchley's petition to this Court for a writ of certiorari to review the decision of the California Supreme Court affirming his conviction and the imposition of the death penalty was granted. After hearing argument this Court concluded that the totality of circumstances manifested by the record did not warrant bringing the case before it. Accordingly, the writ was dismissed. *Atchley v. California,* 366 U.S. 207 (1961).

Atchley then unsuccessfully petitioned the United States District Court for the Northern District of

California for a writ of habeas corpus. The District Court's denial of that petition was affirmed on appeal. *Atchley v. Dickson,* 338 F.2d 1014 (9th Cir. 1964).

The instant proceedings commenced with the filing of a petition for a writ of habeas corpus in the District Court for the Northern District of California on March 10, 1967. An order to show cause issued, counsel was appointed and a supplemental return and traverse were filed. See Appendix pages 7 through 47.

The District Court ordered Atchley's release from custody unless the state afforded him a hearing on the voluntariness of his confession or a new trial. *Atchley v. Wilson,* 300 F.Supp. 68, 73 (N.D. Cal. 1968), Appendix pages 78-79. Warden Wilson appealed to the Court of Appeals for the Ninth Circuit which affirmed the order of the District Court in a per curiam opinion. Judge Barnes dissented. *Wilson v. Atchley,* 412 F.2d 230, 231-232 (9th Cir. 1969), Appendix pages 80-85.

STATEMENT OF FACTS

(A) The Shooting.

At approximately 2:30 a.m. on August 3, 1958, defendant's wife, Marcella Katherine Atchley was shot and killed in the front yard of her home in Gridley, Butte County, California (RT 601-608).[1]

Several days previously she had separated from defendant and moved with her children from his home

[1] "RT" refers to the Reporter's Transcript on Appeal to the California Supreme Court, a copy of which was before the District Court, the Court of Appeals and has been lodged with this Court.

in Palermo to Gridley (RT 513-514). On the evening before her death defendant arrived at her home about 12:30 a.m., parked his car a block away and walked to the house (RT 696). When he did not see his wife's car and no one answered the door, he left to search for her at several bars (RT 1491-1492). Defendant returned to his wife's house about 1:20 a.m. and again parked his car a block away from the house (RT 2352-2353). He removed a .22 caliber automatic pistol from the glove compartment of his car, placed it in the belt of his trousers (RT 1512) and approached the house through a back alley (RT 842).

Atchley waited near the back of the premises until he could see the headlights of his wife's car as it entered the driveway (RT 1536). Mrs. Atchley left the car and was approaching the front door of her house when the defendant stepped from behind the corner of the house (RT 954-955). In the next few minutes Mrs. Atchley was shot six times (RT 1043-1046). Five empty cartridge casings were found near the body in such proximity as to indicate that all of the shots had been fired with the gun in approximately the same position. The absence of powder burns on the victim's clothing showed that the gun was at least two feet from her at the time of the shooting (RT 820-822).

The neighbors were awakened by a woman's voice hysterically crying "Oh, don't, don't" (RT 602), followed by a series of shots (RT 603). They observed the defendant in a stooped position fire two shots toward the ground (RT 603) but their view of the body

was obscured (RT 604). When one of the neighbors asked "What in the hell is going on over there" (RT 604, 605), defendant immediately darted to his car and drove off at a high rate of speed (RT 698).

Defendant returned to his home in Palermo, where he buried the murder weapon in his backyard (RT 956).

Defendant was arrested at his home about an hour and a half after the shooting (RT 956).

(B) Defendant's Statements Admitted at Trial.

Defendant was first questioned at 6 a.m., August 3, by Mr. Anderson, an investigator for the District Attorney's office. At that time defendant stated that he had not been in Gridley that night and denied owning a .22 caliber pistol. He claimed to have gone to bed at his residence in Palermo at 12:30 a.m. and thought Mr. Jones, who had previously threatened Mrs. Atchley, might have done the shooting (RT 836-839). No objection was made to the admission of this statement.

Defendant was not questioned again until 11:30 p.m. on August 3 when Mr. Lazier, an investigator for the State Department of Justice, arrived (RT 759-760). Mr. Lazier made no promises of immunity or threats to induce defendant's statements (RT 761) which were substantially the same as he had given earlier (RT 762-768). These were admitted at trial over defendant's objection (RT 761-762). This questioning continued until about 5 a.m. on August 4, at which time defendant was returned to his cell where he slept until noon (RT 772-773).

During the morning of August 4, the police located the murder weapon at defendant's home in Palermo (RT 775). Defendant, knowing that he was booked for investigation of murder, did not appear nervous when the officers confronted him with the weapon that afternoon (RT 773). He then changed his former story and admitted burying the gun in his backyard (RT 775-776). He also admitted that he had driven to Gridley on the night of the shooting, parked his car about one and a half blocks away from his wife's home, entered the premises by way of the back alley and waited in the rear of the premises (RT 776). When he heard his wife's car enter the carport, he came out from behind the corner of the house and proceeded toward her (RT 777). He claimed that she pointed the gun at him and it went off several times during a struggle (RT 777). After he wrestled the gun away from her it went off several additional times (RT 777). He took the gun with him and returned to Palermo where he buried it (RT 777-778). This statement was admitted after voir dire examination on defendant's objection to its voluntariness (RT 770-774).

(C) The Now Challenged Statement.

Late on the afternoon of August 4, defendant telephoned Ray Travers, a friend and his insurance agent, and asked him to come to the jail (App. 140-141).[2] Mr. Travers arrived at the jail about 10 a.m. on August 5 (App. 141) and had a conversation with

[2]This portion of the reporter's transcript is reproduced in the Single Appendix.

defendant relative to an insurance policy on the life of the decedent which was payable to her children (App. 143-144). During the course of this conversation defendant, on his own initiative, told Travers how the shooting took place (App. 152). As Travers was leaving the jail, he informed the sheriff's officers about defendant's statement (App. 141-142). Travers intended to return to get additional information from defendant for his insurance company (App. 142, 156), and agreed to let the officers tape record their next conversation (App. 156).

At about noon on August 5, Travers returned and had another conversation with defendant. Travers testified that defendant's statements were given freely and voluntarily without promises or inducements (App. 144-145). Atchley was aware that this information had to be reported to Travers' insurance company (App. 142-143).

This tape recorded conversation was played to the jury over defense objection (App. 159-160).

In this statement, Atchley told Travers that on the night of the shooting he was standing behind the corner of the house waiting for Mrs. Atchley's arrival (App. 97, 102). She lunged for the pistol he had tucked in the belt of his trousers and a struggle ensued (App. 97-98, 102-103). During this struggle the gun discharged three times (App. 98). After he pushed her to the ground, the gun, still in his hand, discharged twice (App. 98).

Defendant admitted that he owned the gun over a year and kept it in his car (App. 100-101). He car-

ried the gun to the house to scare the man Mrs. Atchley was running around with (App. 99), and did not intend to kill her (App. 99).

(D) Defendant's Subsequent Statements Admitted at Trial Without Objection.

Defendant did not make any further statements until August 7, 1958, when he was taken to view his wife's body at the mortuary (RT 840). In a conversation which was given freely and voluntarily (RT 874), he told substantially the same story he told Travers (RT 841-850).

(E) Other Evidence Presented at Trial.

At trial, defendant testified that he had been waiting near the back of the house for his wife to return (RT 1495), that he had the pistol in his belt (RT 1496) but maintained that he had it only to scare her for he had no intention of killing her (RT 1501-1502). He testified that when he saw her returning alone he stepped out to greet her but she saw the gun under his shirttail and lunged for it (RT 1497). During the struggle to recover the gun it discharged several times and even after he recovered it, it fired several additional times (RT 1499).

Defendant was born in Tennessee in 1917 where he attended school through the third grade. He could neither read nor write anything other than his name. He moved to California in the early forties and worked initially as an agricultural laborer and then as a welder (RT 1411, 1416-1419). He met the decedent in 1953 and she bore a child which he claimed

was his (RT 1422, 1586). Later in 1953 he left the decedent and moved to Palermo where he opened a bar which he later sold and went to work for his brother in the used car business (RT 1550-1551). He subsequently opened his own used car lot which netted him between eight and thirteen thousand dollars per year (RT 1554). In operating this business he had retained various attorneys and engaged in law suits in Butte County (RT 1551).

In 1957 Mrs. Atchley came to Palermo and moved in with the defendant (RT 1436-1437). They were later married in Georgia but the marriage was not publicized in order to avoid a reduction in the child welfare aid Mrs. Atchley was receiving (RT 1462, 1476). Prior to the shooting, Mrs. Atchley had complained to the police of defendant's threats and also expressed these fears to others (RT 2089, 2339-2340).

During argument defense counsel made the following reference to the now challenged statement,

> ". . . and I think when . . . Atchley was in there that first meeting at 10 o'clock and before they knew anything at all about a whole lot of these things that you have heard here, that . . . Atchley did tell Travers definitely what occurred there. * * * I was going to introduce this statement to you, Ladies and Gentlemen, if the State had not put it in, I would have put it in. Now, let me go over the important parts of this statement." (RT 2587).

The case was tried on the theory of murder which was deliberate and premeditated and also on the the-

ory of murder perpetrated by means of lying in wait. Cal. Pen. Code § 189. The jury was instructed as to second degree murder (CT 163-164);[3] manslaughter (CT 166-168); justifiable homicide (CT 174-175) and self-defense (CT 176-180).[4] The jury concluded that defendant was guilty of murder in the first degree (CT 188).

Pursuant to California procedure defendant's conviction was automatically reviewed by the California Supreme Court [Calif. Pen. Code § 1239, subd. (b)] and affirmed in a unanimous opinion which recognized for the first time in our state that "any statement by an accused relative to the offense charged is inadmissible against him if made involuntarily". *People v. Atchley,* 53 Cal.2d 160, 170, 346 P.2d 764, 769 (1959) App. p. 56. On certiorari from that decision the sole issue presented in Atchley's brief was the voluntariness of his statements. See "Brief of Petitioner" No. 95, October Term, 1960. After hearing oral argument and fully examining the record this Court concluded that "the totality of circumstances as the record makes them manifest did not warrant bringing the

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[3]"CT" refers to the Clerk's Transcript on Appeal, a copy of which was lodged with the District Court and is before this Court.

[4]Petitioner did not request any instructions on admissions or confessions (CT 99-125) and, except for the following cautionary one, none were given:

"The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him." (CT 144).

case [before the court]". *Atchley v. California*, 366 U.S. 207 (1961).[5]

SUMMARY OF ARGUMENT

The District Court erred in granting the writ of habeas corpus in this case because the state court findings that Atchley's confession was voluntarily given were entitled to a presumption of correctness under Title 28, United States Code Section 2254(d). None of the reasons advanced by the District Court for refusing to apply that presumption find any support in the record; indeed, they can be answered by an examination of the opinion of the California Supreme Court. Moreover, the record shows that Atchley's confession was voluntary as a matter of law.

Secondly, this Court should adopt a rule confining the scope of review on federal habeas corpus to the face of the opinion of a state appellate court where the state has provided the prisoner with an adequate corrective process for the adjudication of federal constitutional issues based on disputed questions of fact. Previous decisions of this Court have given insufficient weight to the importance of the finality of state criminal judgments. This Court should consider the effect of its recent series of decisions which guarantee state

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[5]While we recognize the general rule that a denial of certiorari is not entitled to persuasive effect in subsequent proceedings [*Brown v. Allen*, 344 U.S. 443, 489-498 (1953)] where, as in this case, certiorari is withdrawn as having been improvidently granted after briefs were filed and argument heard it must be presumed that the record did not manifest any unfairness at the hearing on the issue of the voluntariness of Atchley's statements.

criminal defendants the right to a meaningful appeal in the state courts.

Finally, the District Court erred by ordering the California courts to hold a hearing on the admissibility of petitioner's confession where no California court has jurisdiction to do so in the absence of an application by petitioner.

ARGUMENT

I

THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE PRESUMPTION OF CORRECTNESS DECLARED IN TITLE 28, UNITED STATES CODE, SECTION 2254(d), TO THE FINDINGS OF THE STATE TRIAL AND APPELLATE COURTS THAT ATCHLEY'S TAPE RECORDED STATEMENT WAS VOLUNTARY

Townsend v. Sain, 372 U.S. 293 (1963), empowers federal district courts to hold evidentiary hearings to resolve contested issues of fact in habeas corpus proceedings brought by state prisoners. A duty to hold such hearings was imposed on the district courts only when the state courts had not provided a full and fair evidentiary hearing on the issue. Guidelines were announced for the district courts to follow in exercising their discretion to hold plenary hearings in other cases.[6]

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[6]Those guidelines were: (1) The merits were not resolved in the state court proceedings; (2) The factual determinations made in the state court proceedings were not fairly supported by the record; (3) the procedure employed in the state court was inadequate to a full and fair hearing; (4) There was a substantial allegation of newly discovered evidence; (5) Material facts were not adequately developed; (6) The state did not afford a full

Thereafter, Title 28, Section 2254 was amended [Public Law 89-711, § 2, 80 Stat. 1105] to increase the number of situations in which a state court determination of a factual issue was to be accorded finality. *See* Statute Note, 45 Tex.L.Rev. 592, 596. These amendments to Section 2254 apply a qualified doctrine of res judicata in federal habeas corpus proceedings brought by state prisoners. *See* Senate Report 1979, 89th Cong. 2d Sess. 1, 3 U.S. Code, Cong. § A.B. News 36, 63 (1966). When enacted, Section 2254(d) was hailed as a great assistance to the district courts in relieving their overcrowded dockets by limiting the situations in which evidentiary hearings should be held. Cerf, *The Federal Habeas Corpus Act,* 22 U.Mi.L.Rev. 409, 492 (1967). It was also felt to have effected a badly needed reform in reducing the rising friction between state and federal judicial systems. *Johnson v. Florida,* 283 F.Supp. 494, 497 (S.D.Fla. 1968).

The failure of the federal district courts to give this amendment the effect intended by Congress, as exemplified by this case, has led to more drastic proposals for legislative reform.[7] If the reforms intended

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and fair hearing. *Townsend v. Sain, supra,* at 313-318. Title 28, United States Code, Section 2254(d) codifies most of these guidelines with the notable exception of "newly discovered evidence" which, having been specifically deleted, will not support a collateral attack on the presumptive validity of a state court finding.

[7]The "Omnibus Crime Control and Safe Streets Bill of 1968" was reported from Senate Committee with provisions which removed from federal courts the power to reverse state convictions involving admissions or confessions introduced into evidence as voluntarily given where the highest court of the state had ap-

by the enactment of Title 28, United States Code Sec-2254(d) are frustrated, as they were in the instant case, then more severe legislative action is to be expected.

Title 28, United States Code Section 2254 as amended in 1966, accords a presumption of correctness to factual determinations made by state Courts at a hearing on the merits. The burden of establishing an exception to this presumed validity rests on the prisoner who must show, by convincing evidence, that the factual determination of the state court was erroneous. 1966 U.S. Cong. & Adm. News Vol. II, pp. 3666-67.

A. The State Courts' Findings on the Issue of Voluntariness.

1. The Trial Court Finding:

In the instant case, following his arrest, defendant Atchley made numerous statements. Initially he denied being near the decedent's home on the night of the murder (RT 150-152; 759:768) until the police found the murder weapon at his house. He then admitted going to his wife's home (RT 776) but claimed that the gun was his wife's and it discharged during a struggle to prevent her from shooting him (RT 777).

Defendant's later statements to Travers altered his previous statements only by admitting that he had brought the pistol to the scene (App. p. 98).

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proved their admission. 1968 U.S. Cong. & Adm. News, Vol. II, p. 2123. The committee felt that whether a confession was voluntarily given is essentially a question of fact which should be decided at the trial level.

Two days after his conversations with Travers, which defendant did not know had been recorded, he told the sheriff's officers substantially the same story (RT 841-850). This statement was admitted at trial without objection (RT 840-850).

When the prosecutor offered into evidence the tape recording of defendant's second conversation with Travers, counsel objected and requested an in chambers hearing on his objections (App. p. 86). During the course of this hearing it became apparent to the trial court after listening to the tape recording that the statement approached a confession (App. p. 126-127) and the court admonished the prosecutor that "before the tape is used I think that the same foundation should be laid as is used for the introduction of a confession" (App. p. 127). The court then ruled that the tape would not be played to the jury unless such a foundation was laid (App. p. 131).

When court reconvened before the jury Travers' testimony established the necessary foundation (App. pp. 141-145) and the court allowed the tape recording to be played over defendant's objection (App. p. 160). This admission of Atchley's statement to Travers over his objection to its voluntariness was clearly "A determination after a hearing on the merits of a factual issue," and thus entitled to the presumption of validity conferred by Title 28, United States Code, Section 2254(d).

2. The Appellate Court Holding:

The California Supreme Court, after a full review of the record, recognizing that Atchley's statement would be inadmissible if made involuntarily (*People v. Atchley,* 53 Cal.2d 160 at 170-171, 346 P.2d 764 at 769), unanimously found that there was "no merit in defendant's contention that this recording was admitted without a proper showing that his statements were made voluntarily". That court, while reviewing the admissibility of Atchley's statements, noted particularly Travers' testimony that there were no threats nor inducements for these statements and found "substantial and uncontradicted evidence that no coercion occurred." *People v. Atchley,* 53 Cal.2d 160, 170-171, 346 P.2d 764, 769 (1959). We submit that this holding of the California Supreme Court made after a full review of the trial record is entitled to the presumptive validity conferred by Title 28, United States Code, Section 2254(d).[8]

B. The District Court Erroneously Concluded that the Presumptive Validity of these Findings had been Vitiated.

In contrast to the specific findings of the state courts, the District Court concluded that there had been no reliable determination of the issue of the voluntariness of this confession (App. p. 76). Defendant had the burden of overcoming the presumptive va-

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[8]Symptomatic of the confusion over the proper application of Title 28, United States Code Section 2254(d) in the Ninth Circuit are *Mathis v. Nelson,* 411 F.2d 1363, 1372 (9th Cir. 1969), which holds that appellate court opinions are entitled to the presumption of validity and *Hutchinson v. Craven,* 415 F.2d 278, 279-280 (9th Cir. 1969), which denies to such holdings this presumption.

lidity accorded these findings. The record does not support the District Court's conclusion that Atchley rebutted the presumptive validity of either the state trial or Supreme Court finding that his statement was voluntary.

The District Court, in the face of the California Supreme Court's conclusion to the contrary, held that the trial Court erred in five specific instances[9] by refusing to hear evidence offered by the defendant prior to the introduction of this tape recording. Based upon this conclusion, the District Court held that the fact finding procedure employed by the state Court was not adequate to afford a full and fair hearing on this issue and thus the presumption of validity was rebutted (App. pp. 76, 78 n. 8). Title 28, U.S.C. § 2254 (d)(2).

However, the development of the material facts in the trial court was adequate in every respect. Most of the evidence Atchley allluded to on the issue of voluntariness at the in-chambers hearing was eventually admitted and thus was contained in the record reviewed by the California Supreme Court. That court was confronted with defendant's contention that the trial court erred in admitting the statement.

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[9]Discussed individually *infra*, the specific instances of alleged error are: (1) that defendant had communicated to the police his desire to have an attorney; (2) that Travers' feigned sympathy for the defendant deceived him about his motives in questioning him; (3) that defendant did not know the statement was being tape recorded; (4) what the officers said to Travers before he agreed to allow his conversation with the defendant to be tape recorded; and (5) evidence of defendant's mental condition, his ability to read and write, and the extent of his education at the time the statements were taken (App. pp. 74-76).

This tape recording was played in chambers prior to the court's ruling on its admissibility and it reflects the following colloquy regarding Atchley's request for counsel:

> "Q. [Travers] I don't know who your attorney is. What was that fellow's name?
> A. [Atchley] I was trying to get Madino Cardo(?)
> Q. Madino Cardo?
> A. Yes.
> Q. San Jose?
> A. Yes." (App. pp. 104-105).

When defense counsel attempted to elicit additional information from Travers regarding defendant's requests for counsel, the trial court sustained the prosecutor's objection on the grounds of relevancy (App. p. 155).

Since the California Supreme Court had held such evidence material on the issue of voluntariness as early as 1951 (*People v. Stroble,* 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 [1951]) defendant correctly contended on appeal that this ruling was erroneous. However, he could not establish that it was prejudicial. As the California Supreme Court noted in defendant's case:

> "Although a refusal to permit defendant to talk to counsel suggests an intent to coerce, it seems highly improbable that either the trial judge or the jury would have inferred coercion from such a refusal alone in the light of the *substantial and uncontradicted* evidence that no coercion oc-

curred." (Emphasis added). *People v. Atchley, supra,* 53 Cal.2d at 171, 346 P.2d at 770, App. p. 58.

Defendant never claimed he could not afford an attorney and the record establishes that he had access to the telephone (App. p. 141).

The California Supreme Court also directed itself to defendant's contention regarding Travers' feigned sympathy and concluded:

> "In . . . [*Leyra v. Denno,* 347 U.S. 556 (1954)] the police, having promised a suspect medical treatment for an acutely painful attack of sinus, introduced as the 'doctor' a highly skilled psychiatrist with a considerable knowledge of hypnosis. . . . Although there was a similar deception in the present case, there was no comparable mental coercion. The deception itself does not render defendant's statements inadmissible, for it was not of a type reasonably likely to procure an untrue statement." *People v. Atchley, supra,* 53 Cal.2d at 171, 346 P.2d at 769.

Whether Atchley knew his conversation with Travers was being recorded is irrelevant. While talking to Travers, defendant understood that his statements would not be held in confidence, that they would at least be forwarded to the insurance company (App. pp. 142-143). Hence, although the tape recorder may have been an uninvited ear, the statements it overheard had been knowingly exposed to the public by defendant. *Compare, Katz v. United States,* 389 U.S. 347, 351-352 (1967).

The District Court's conclusion that the hearing in the trial court was inadequate is based in part upon its finding that the trial court erred in limiting the proposed recross-examination of the undersheriff, who requested Travers' permission to make a tape recording of the second conversation. Undersheriff Spann was called by the prosecution prior to the introduction of the tape recording and his direct examination did not cover his conversations with Travers. Atchley requested an opportunity to reopen his cross-examination in order to go into these matters prior to the introduction of the tape recording. California and the majority of states follow the federal rule restricting cross-examination to the scope of the direct examination and thus, the trial court properly limited the proposed recross-examination of Officer Spann. Defendant could not have suffered any prejudice since his attorney knew he could call any of the People's witnesses as his own on direct examination and go into any matter relevant to the case (RT 932). Furthermore, whatever Undersheriff Spann may have said to Travers before he consented to their tape recording his second conversation with Atchley is immaterial to the voluntariness of that statement. Travers testified that prior to the officer's request that they be allowed to tape record his conversation with the defendant he intended to have an additional conversation with the defendant in order to acquire additional information for his insurance company (App. p. 156).The recorded conversation, as heard by the trial court, does not reflect any evidence of coercion

or pressure brought to bear by Travers either on his own volition or under direction of the undersheriff (App. pp. 97-105).

Finally, the District Court's charge that the trial court erred in excluding evidence regarding defendant's ability to read and write prior to admitting this tape recording is directly refuted by the record. Travers testified on cross-examination that he was unaware Atchley could not read nor write (App. p. 146). When asked if he had ever given Atchley anything to read the prosecutor objected that the question was irrelevant to the issue of voluntariness (App. p. 147). A lengthy discussion ensued until the trial court ruled "The objection will be overruled. You may proceed" (App. p. 148). Thereafter, defense counsel failed to pursue the issue of whether Atchley could read and write. Hence, the trial court cannot be charged with erroneously excluding such evidence. Indeed, such evidence was beyond the knowledge of this witness.

The District Court concluded that because of these erroneous exclusions of relevant evidence on the issue of voluntariness the hearing held in the trial court was not adequate to insure a reliable and clear cut judicial determination of the voluntariness of the confession as required by *Jackson v. Denno,* 378 U.S. 368, 369 (1964). Appendix p. 76. *Jackson v. Denno, supra,* concerns the inherent integrity of the fact finding process and has been held to be fully retroactive. *Pinto v. Pierce,* 389 U.S. 31 (1967). However, at the time of defendant's trial California followed the approved, or "Massachusetts," procedure for the ad-

mission of confessions. *Jackson v. Denno, supra,* at 418 (Black, J., dissenting). As recognized by the trial court (App. p. 127) the burden rested upon the prosecution to establish that the confession was voluntary (*People v. Trout,* 54 Cal.2d 576, 583, 354 P.2d 231, 235 [1960]; *People v. Berve,* 51 Cal.2d 286, 291, 332 P.2d 97, 99 [1958]). The prosecution met the foundational requirement by presenting evidence of voluntariness (App. pp. 140-145) and the defendant had an opportunity to controvert the prosecution's showing (App. pp. 146-159). The trial judge was "duty bound to withhold . . . [the statement] from the jury's consideration" if he found the statement to be involuntary. *People v. Gonzales,* 24 Cal.2d 870, 876, 151 P.2d 251, 254 (1944). Thus, defendant secured a judicial determination on the issue of voluntariness, as required by *Jackson v. Denno,* 378 U.S. 368 (1964), before the statement was submitted to the jury.

Although, he could have had this issue resubmitted to the jury, defendant never requested any instructions regarding his statements (CT 100-125). In fact, he argued to the jury the truth of the now challenged statement (RT 2587). Contrary to the District Court's holding (App. p. 78, n. 8) only where the evidence concerning the circumstances surrounding a confession is in conflict must the trial court instruct the jury that they should also make a determination on the issue of voluntariness. *People v. Belvins,* 54 Cal.2d 71, 77, 351 P.2d 776, 780 (1960). The evidence in the instant case was not in conflict as to the circumstances surrounding the defendant's statement. There was no

factual question to be resolved by the jury, and therefore, no instructions on this issue were required. *Compare, Commonwealth v. Howard,* 212 P.A. Super, 100, 239 A.2d 829 (1968).

The District Court apparently concluded that certain applications of the classic test of voluntariness[10] announced by this Court after defendant's trial[11] were "new" law in the field of voluntariness and alternatively held that the trial Court followed an erroneous standard of law in determining this issue (App. p. 78, n. 8). However, those cases did not direct attention to any circumstances to be considered in ultimately determining voluntariness which were not implicit in earlier opinions of this Court[12] and were also recognized law in California at the time of defendant's trial.[13] Surely this Court does not envision relitigating the issue of voluntariness in every case where a statement was admitted against a prisoner whenever it applies the test of voluntariness to a situation which requires a reversal.

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[10]Whether an examination of "the totality of the circumstances" shows that the defendant was deprived of "a free choice to admit, to deny, or to refuse to answer." *Lisenba v. California,* 314 U.S. 219, 241 (1941).

[11]*Reck v. Pate,* 367 U.S. 433 (1961); *Culombe v. Connecticut,* 367 U.S. 568 (1961); *Gallegos v. Colorado,* 370 U.S. 49 (1962); and *Davis v. North Carolina,* 384 U.S. 737 (1966).

[12]*See, Chambers v. Florida,* 309 U.S. 227 (1939); *Ashcraft v. Tennessee,* 322 U.S. 143 (1943); *Lisenba v. California,* 314 U.S. 219 (1941); *Turner v. Pennsylvania,* 338 U.S. 862 (1949); and *Fikes v. Alabama,* 352 U.S. 191 (1955).

[13]*See, In re Wallace,* 24 Cal.2d 933, 937, 152 P.2d 1, 3 (1944); *People v. Stroble,* 36 Cal.2d 615, 624-627, 226 P.2d 330, 336-338 (1951); *People v. Millum,* 42 Cal.2d 524, 526-528, 267 P.2d 1039, 1040 (1954); *People v. Berve,* 51 Cal.2d 286, 292, 332 P.2d 97, 100 (1958); and *People v. Speaks,* 156 Cal.App.2d 25, 36-37, 39, 319 P.2d 709, 716-719 (1957).

C. Defendant's Statement was Voluntary as a Matter of Law.

As noted in *Davis v. North Carolina,* 384 U.S. 737 (1966), the non-retroactive effect of *Miranda v. Arizona,* 384 U.S. 436 (1966), does not affect the duty of trial courts to consider claims that a statement was taken under circumstances which violated the standards of voluntariness as those standards had begun to evolve before this Court's decision in *Miranda v. Arizona, supra,* and *Escobedo v. Illinois,* 378 U.S. 478 (1964). Although there are numerous circumstances to be considered in deciding a claim of involuntariness, the essential test remains unchanged. "Is the confession a product of an essentially free and unconstrained choice by its maker?" *Culombe v. Connecticut,* 367 U.S. 568, 602 (1961). In this case it can be said, as a matter of law, that this statement was the product of Atchley's free and unconstrained choice.

The only reference contained in the District Court's Memorandum of Decision to the fact that two separate conversations took place between defendant and Travers was:

> "Travers testified that he had visited the jail in the morning of August 5th and conversed with Atchley at Atchley's request. After that conversation, Travers admitted that he was asked by the undersheriff to engage Atchley in a second conversation which would be recorded and that he complied with the request. Travers further testified that he offered no threat, promise or inducement to Atchley." App. p. 72.

Although this summary of the first and second conversations is correct, we submit that its brevity over-

looks the importance of this circumstance. We have consistently contended that the tape recorded conversation, being substantially the same as the initial conversation, was voluntary as a matter of law.

Travers testified that on the evening of August 4, defendant requested that he visit him in order to talk about the insurance policy and replenish his supply of cigarettes (App. 141-143). Of this initial conversation, Travers said:

> "Mr. Atchley brought the subject up to me when he was sitting there. I was sitting there and we were talking about the policy and he brought the whole story as he told it to me exactly what happened. He voluntarily told me about it. I did not ask him about it the first time." (App. 152).

Travers testified on cross-examination that prior to his initial conversation with defendant he was never asked by the police to interrogate him about the shooting (App. 152). In response to further questioning by defense counsel Travers testified that the first and second conversations were substantially the same (App. 152, 158).

After the morning conversation, Travers told Officer Spann what defendant had told him and informed him that he had to return later in order to secure further information for his insurance company (App. 141-142). Travers did not threaten defendant nor offer any inducement to secure the statements App. 142). During the recorded conversation defendant understood that what he said would have to be reported to the insurance company (App. 142-143).

Since the initial conversation was clearly spontaneous, and there being no allegation nor proof of any intervening coercive influences, it must be held that defendant's second conversation with Travers was voluntary as a matter of law. Furthermore, Atchley cannot establish that he was prejudiced by the admission of the tape recording since it contained substantially the same statements Travers testified defendant made during their first conversation (App. 152, 158).

We submit, therefore, that the District Court erred in not holding the statement voluntary and dismissing the petition.

II

ON FEDERAL HABEAS CORPUS PROCEEDINGS BROUGHT BY STATE PRISONERS THE DISTRICT COURT'S SCOPE OF REVIEW SHOULD BE CONFINED TO WHETHER THE PRISONER WAS AFFORDED A FAIR REVIEW OF HIS CONVICTION IN THE STATE COURTS WHICH WAS ADEQUATE TO ALLOW A RESOLUTION OF THE MATTERS HE SOUGHT TO PRESENT

In this case, Atchley challenged the admissibility of his confession at trial and on appeal to the California Supreme Court. That court, well aware of the rule that a confession is inadmissible unless voluntarily made, reviewed the transcript and prepared an opinion which considered and resolved each of Atchley's contentions. This Court brought the state proceedings before it on a writ of certiorari and, after hearing argument, dismissed the writ as improvidently granted. If the District Court's decision in this case

is correct, then the state appellate review in this case was useless. Indeed, it is a waste of judicial resources for state appellate courts to adjudicate constitutional claims in criminal cases. That is why the instant case presents this Court with an opportunity to effect a badly needed reform in the administration of federal habeas corpus, a reform which will give greater finality to state appellate court decisions, conform to the intent of Congress as manifested in Title 28, United States Code Section 2254(d), and relieve crowded federal dockets, while not substantially detracting from the protections now available to state criminal defendants. In fact, it may well serve to make those protections more effective. We submit that such a reform is necessary to relieve the major cause of the present stress on the administration of justice, caused by the federal district courts' refusal to afford finality to state criminal judgments where the facts underlying the constitutional claims have been fairly litigated in the state courts.

We therefore ask this Court to adopt the following rule:

> "Where the state has provided adequate corrective process for the adjudication of the factual issues bearing on a prisoner's federal constitutional claims, either by way of appeal or collateral attack, and it appears from the face of a state appellate court opinion that the prisoner's contentions were fairly considered in the light of applicable constitutional law, the federal district court should not undertake further review of those factual issues."

We acknowledge that this proposed rule is something of a departure from previous decisions of this Court. In *Brown v. Allen,* 344 U.S. 443 (1953), this Court held that a prisoner who had exhausted state court procedures for the litigation of his constitutional claims could reassert them on federal habeas corpus. This holding was extended in *Fay v. Noia,* 372 U.S. 391 (1963), to allow federal review of cases in which the state prisoner's confinement rested on an adequate and independent state ground. Contemporaneously, this Court broadened the power of district court judges to hold evidentiary hearings on contested issues of fact. *Townsend v. Sain,* 372 U.S. 293 (1963). In asking this Court to modify these rules we seek to change the thrust of inquiry on federal habeas corpus away from whether the ultimate factual issues were correctly decided and direct it toward whether the prisoner had a fair opportunity in the state courts to have as complete a hearing on his claim as he desired. This proposed rule will afford finality to criminal judgments in those cases where a state prisoner has been given a meaningful appeal, or its equivalent on state collateral attack, and an examination of the opinion of the state appellate court shows that the prisoner's constitutional claims were fairly considered. Under this rule, where it appears that the prisoner has had a fair opportunity to present his claims to the state appellate courts, as defendant did in the instant case, and the state appellate court has applied the correct legal standard, the writ should be denied without an evidentiary hearing or review of the state trial court transcript.

In support of our proposed rule we call the Court's attention to the following considerations.

A. Finality of Criminal Judgments

We submit that the decisions in *Brown v. Allen*, 344 U.S. 443 (1953); *Townsend v. Sain*, 372 U.S. 293 (1963), *Fay v. Noia*, 372 U.S. 391 (1963), and *Sanders v. United States*, 373 U.S. 1 (1963), gave insufficient consideration to the importance of finality of criminal judgments. The proposed rule corrects this imbalance.

In *Fay v. Noia*, 372 U.S. 391, the majority opinion stated:

> "Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary judicial review." *Id.* at 424.

This Court is now presented with an opportunity to reconsider this principle. We urge its rejection in favor of a rule which would afford finality to state court judgments in those cases where the history of the proceedings as reflected in the opinion of a state appellate court shows that the issues sought to be litigated by the habeas petitioner were argued and fairly considered in state court proceedings adequate for their just resolution and conducted in a manner consistent with the opinions of this Court.

State trial and appellate procedures have received considerable attention from this Court since *Noia*,

Townsend and *Sanders* were decided. While those decisions were eroding the finality of state criminal judgments, other decisions of this Court guaranteed every state criminal defendant the availability of adequate state corrective process both for the litigation at trial and review on appeal of federal questions in the state Courts. State prisoners are now entitled to counsel at trial, *Gideon v. Wainwright,* 372 U.S. 335 (1963); confrontation of witnesses, *Pointer v. Texas,* 380 U.S. 400 (1965); definitive rulings by trial judges on their objections to the admissibility of confessions, *Jackson v. Denno,* 378 U.S. 368 (1964); *Sims v. Georgia,* 385 U.S. 538 (1967); and, where the state provides appellate review in criminal cases, the right to a free transcript of the trial proceedings or its equivalent for review on appeal, *Griffin v. Illinois,* 351 U.S. 12 (1956); *Draper v. Washington,* 372 U.S. 487 (1963); and the right to counsel on appeal, *Douglas v. California,* 372 U.S. 353 (1963), serving in the capacity of an advocate, *Anders v. California,* 386 U.S. 738 (1967). The requirements that have been imposed by this Court guarantee procedures in the state courts which are calculated to reach a just resolution of any material issue a defendant may seek to raise. They embody the concept of adequate state corrective process and, in view of these decisions, we think that this Court should now pronounce a corollary rule giving finality to state judgments rendered in satisfaction of the procedural requisites instead of allowing, as does the current practice, constant relitigation on the merits of contested issues of fact, even

where procedural fairness has been afforded to the defendant.

Affording finality to state court appellate opinions when the procedural requirements have been met, will encourage state appellate courts to determine constitutional issues on their merits. On the other hand, to deny finality to state appellate opinions removes any reason for state appellate courts to review federal constitutional issues.

Never has the imperative of finality in the administration of criminal justice been better explained than it was by Professor Paul M. Bator in his definitive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harvard Law Review 441 (1963). Professor Bator there pointed out the many undesirable results of undermining the finality of criminal judgments by allowing the relitigation of contested factual issues. Such relitigation undermines public confidence in the administration of criminal justice, tends to demoralize state trial and appellate judges, and saps the criminal law of its deterrent effect by clouding the certainty of punishment even after a judgment has been affirmed on appeal. Moreover it is totally at odds with any idea of rehabilitating criminal offenders. In Professor Bator's words, "the idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility." *Id.* at 452.

Professor Bator proposes that for the purposes of federal habeas corpus, the detention of a state pris-

oner should not be deemed unlawful if based upon the judgment of a state court of competent jurisdiction which afforded the prisoner full corrective process, including a meaningful appeal, for the litigation and resolution of all issues he sought to raise involving his federal rights. A member of this Court has recently proposed a similar test:

> "One considered appeal is enough, in the absence of factors which show a possibility that substantial injustice has been inflicted on the defendant." *Wade v. Wilson*, ... U.S. ....., 24 L.ed.2d 470 (1970), Black, J., dissenting.

Our proposal is also in accord with that recently expressed by another member of this Court in a somewhat different context.[14] While discussing the development of rules limiting the retroactive application of newly announced constitutional doctrines in criminal cases as an accommodation necessitated by the availability to state prisoners of federal collateral attack, Justice Harlan observed that federal habeas corpus, as presently constituted, serves two main purposes. First, it seeks to assure that no man is incarcerated

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[14]Justice Harlan proposes a test that if the District Court can say with assurance that, at the time of defendant's trial, this Court would have ruled against his contention even though it may have subsequently accepted his arguments, then the prisoner is not entitled to habeas corpus relief. *Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J. dissenting). Since this Court previously entertained the issue of the voluntariness of defendant's statement on direct review of his conviction, we submit it can be said with absolute assurance at the time of defendant's trial this Court would have ruled against this contention, even if it subsequently accepted some of the defendant's arguments in other factual situations. *Compare Desist v. United States*, 394 U.S. 244, 261 (1969) (Harlan, J., dissenting).

under a procedure which creates an impermissibly large risk that the innocent will be convicted. Secondly, the writ functions as an incentive to state courts to conduct their proceedings in accordance with constitutional guarantees. *Desist v. United States, supra.*[15] Whether a constitutional announcement of this Court is entitled to retroactive application on collateral attack by state prisoners should be resolved by determining whether the particular decision is an announcement of a "new" rule or merely the application of a settled, but previously unarticulated, concept. *Desist v. United States,* 394 U.S. 244, 261 (1969) (Harlan, J., dissenting.) Only where a constitutional ruling of this Court significantly improves the existing, fact-finding procedures is full retroactive application necessary to fulfill the purposes of the federal writ of habeas corpus.[16] In all other cases the function of the writ is discharged when the District Court applies the constitutional standards

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[15]The rule we propose would serve both purposes. Indeed, it would increase the incentive to the state courts to provide full appellate review.

[16]If the prisoner alleges that his trial was marred by a constitutional defect relating to the integrity of the fact finding process, his conviction would be vulnerable to collateral attack. However, without such an allegation the prisoner has alleged nothing which prevented the state trial and appellate courts from constituting an unbiased tribunal and therefore, the prisoner must bear a heavier burden if he is successfully to mount a collateral attack upon his conviction. *Compare Kaufman v. United States,* 394 U.S. 217, 235 (1969) (Black, J., dissenting), and *Justus v. New Mexico,* 378 F.2d 344 (10th Cir. 1967). There the 10th Circuit held that a prisoner's unrebutted testimony that he was forced to confess did not meet the burden of proof required to overcome the presumed correctness of the state court finding that the confession was not obtained by violence.

that prevailed at the time the trial took place. *Desist v. United States, supra.*

Applying this analysis to the present case, at the time of Atchley's trial and appeal, California had adopted and applied all the procedural safeguards thereafter announced by this Court. Under our proposed rule the District Court would have confined its review to the opinion of the California Supreme Court, and absent an alleged defect going to the integrity of the fact-finding or appellate process, such as a denial of counsel at trial or on appeal, or the failure to afford a transcript or its equivalent, would have deferred to the conclusions of the California Supreme Court.

B. Conformity with the Intent of Congress

We submit that our proposal for reform of current habeas corpus practice corresponds with the intent of Congress as expressed by the enactment of Section 2254(d). Although, it is our position that Section 2254(d) should be interpreted to cover state appellate court holdings (See Argument I, *supra,* p. 17), our proposed rule confers a presumptive validity to state appellate court opinions analogous to that presumption of correctness which section 2254(d) unquestionably gives to state trial court findings of fact. If, in this respect, our proposal goes beyond the actual statute, it is in accordance with the intent and concern expressed by Congress when that amendment was passed.

C. Relief of Federal Court Dockets

A modification of this Court's former opinions along the lines we propose would markedly relieve the crowded calendars of the federal district courts. Interpreting the present rules, the courts of appeals have held that the district courts may not rely on state court findings without undertaking an independent review of the record of the state trial court proceedings. *United States ex rel. Worlo v. Pate,* 411 F.2d 972 (7th Cir. 1969); *United States ex rel. Thomas v. Maroney,* 406 F.2d 992, 994-95 (3d Cir. 1968); *Maes v. Patterson,* 401 F.2d 200 (10th Cir. 1968); *Brown v. Crouse,* 399 F.2d 311 (10th Cir. 1968); *see also Piche v. Rhay,* ..... F.2d ..... (9th Cir. 1970); *Connor v. Wingo,* 409 F.2d 21 (6th Cir. 1969); *Canales v. Baker,* 406 F.2d 685, 686-87 (10th Cir. 1969); *Dentis v. Oklahoma,* 376 F.2d 590 (10th Cir. 1967). This burden devolves upon the federal district courts without regard to the length of the transcripts involved.[17] We think the Federal Courts ought to be relieved of this burden in cases where an examination of the face of the opinion of the state appellate court clearly shows that the habeas petitioner received a thoughtful consideration of his claim.

D. Application of the Proposed Rule to this Case

When the present habeas corpus proceedings are examined in the light of our proposed rule, it becomes clear that the District Court exceeded the proper

[17]It is commonplace in the handling of criminal appeals to find trial transcripts more than one hundred pages long and many transcripts, such as the present one, exceed two thousand pages.

scope of review by granting relief because petitioner's allegations merely raised a question of fact which had been decided against him by the trial court, whose decision was affirmed by the highest state appellate court in a proceeding whose fairness was and is unchallenged. In those proceedings, Atchley was afforded counsel, an unbiased trial court and full appellate review on the merits, in sum, the essence of fairness. As long as Atchley has had a constitutionally "fair" hearing, its "fullness" depended upon the relevant and material issues he wished to litigate at that time.

Under our proposed rule defendant's only claim which would entitle him to review in federal habeas corpus concerns the failure of the trial court to comply with the requirements of *Jackson v. Denno, supra*. As noted above, this finding is without support in this record (*supra*, pp. 22-23). The District Court's reasons for concluding that the facts were not fully developed at the hearing in the trial Court had been anticipated by the California Supreme Court and found to be without merit. Thus, the District Court should have denied the writ after reviewing the opinion of the California Supreme Court.

This procedure would be far preferable than the present practice of reviewing the merits of state court findings. Rather than the expansion of the fact finding function on habeas corpus (*Cf. Townsend v. Sain, supra*), extreme restraint in ordering evidentiary hearings is called for, particularly in view of the fact that habeas corpus petitions, as evidenced by the instant case, are often filed many years after convic-

tion, when prosecution has become impractical because witnesses are no longer available, memories have faded and other evidence has disappeared. See Symposium, Habeas Corpus—Proposal for Reform, 9 Utah L. Rev. 18, 41 (1964). The problems arising from insistent relitigation can be solved with some degree of success if district courts are directed to consider the fact finding processes, evidentiary rulings, and evaluations of the state courts and their appellate opinions well nigh conclusive and irrebutable, thereby concentrating the district court's efforts on the correction of serious errors in the state court's understanding and interpretation of federal constitutional law. To this end we urge this Court to adopt our proposed limitation of collateral review of state court findings.

III

THE FEDERAL DISTRICT COURT HAS ORDERED THE CALIFORNIA COURTS TO HOLD A HEARING IN EXCESS OF THEIR JURISDICTION

The Federal District Court, choosing to employ the "procedure of convenience" outlined in *Jackson v. Denno,* 378 U.S. 368 (1964), ordered the state to hold a hearing on the voluntariness of Atchley's statement or suffer reversal of his conviction.

We concur with the District Court's conclusion that if a hearing upon the issue of voluntariness is necessary, it should be held in the state courts. However, Atchley's judgment of conviction has long since be-

come final in the California courts. There is, at this time, no state court possessed of jurisdiction over this cause to hold the hearing envisioned by the District Court's order. The necessary jurisdiction can be conferred upon a California court pursuant to its habeas corpus jurisdiction (Calif. Const., Art. VI, § 10), if an application is made at the instance of the prisoner. Cal. Pen. Code, § 1474. There is no procedure in California whereby the People can properly initiate such a hearing.

Attempts to do so in other jurisdictions have resulted in confusion and litigation.[18] We believe that the procedure outlined in *Jackson v. Denno, supra,* should be understood to require the prisoner to commence the proceedings in the state courts where that is required to invest them with jurisdiction.

Regardless of the forum in which these hearings are held, they remain evidentiary hearings whose purpose is to resolve an issue raised on collateral attack. Hence, the burden of proof remains upon the prisoner whether he or the state initiates the hearing.

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[18]*Compare, Williams v. Beto,* 386 F.2d 16, 17-19 (5th Cir. 1967), where Williams claimed the findings of the state court after such a hearing were invalid because that court had acted without jurisdiction.

CONCLUSION

Louis S. Nelson,[19] Warden, California State Prison, San Quentin, California, respectfully requests this court to remand the case to the Ninth Circuit Court of Appeals with directions to reverse the order of the District Court granting the writ, and to direct the Court of Appeals to order the District Court to deny Atchley's petition for the writ of habeas corpus.

Dated, April 9, 1970.

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